Supreme Court, U.S.
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No. 03-411

IN THE

Supreme Court of the United States

FRED PARKER, *et al.*,
Appellants,

v.

STATE OF OHIO, *et al.*,
Appellants.

Appeal from the United States District Court for the Southern District of Ohio

MOTION TO AFFIRM

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QUESTIONS PRESENTED

In this case, a unanimous three-judge federal District Court held that the 2001 reapportionment of the Ohio General Assembly did not violate §2 of the Voting Rights Act, 42 U.S.C. §1973, or the Fourteenth or Fifteenth Amendments to the United States Constitution. The questions presented on this appeal are:

1. Did the District Court properly rule that Plaintiffs-Appellants had not satisfied their burden of establishing a *prima facie* case of vote dilution in violation of §2 of the Voting Rights Act by failing to prove the first and third *Gingles* preconditions?

2. Did the District Court properly rule that Plaintiffs-Appellants' Fourteenth Amendment claim failed because their evidence was insufficient to prove that race was the predominant factor motivating the drawing of district lines?

3. Did the District Court properly rule that Plaintiffs-Appellants failed to introduce sufficient evidence of intentional racial discrimination to support their claim under the Fifteenth Amendment?

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The decision of the court below presents no issue worthy of plenary review. Accordingly, Appellees respectfully request this Court to summarily affirm the judgment of the District Court.

STATEMENT OF THE CASE

A. The Apportionment Process in Ohio

Pursuant to Article XI, §1 of the Ohio Constitution, the Ohio Apportionment Board convenes every ten years in the year following the decennial census. Ohio Const., Art. XI, §1.[1] The 2001 Apportionment Board, consisting of Defendants-Appellees, Governor Robert A. Taft, Jr. ("Taft"), Secretary of State J. Kenneth Blackwell ("Blackwell"), then Auditor of State Jim Petro ("Petro"), and Ohio House of Representatives Speaker Larry Householder ("Householder"), as well as Plaintiff-Appellant and then Ohio Senator Leigh Herington, ("Herington"), convened on August 2, 2001. At the initial meeting, the Board elected Taft as its Chairman, and appointed Defendant-Appellee Scott P. Borgemenke ("Borgemenke"), as its Secretary.

Following the initial meeting, Taft, Blackwell, Petro, and Householder ("Majority Members") directed Borgemenke to draft and submit a plan of apportionment on their behalf. Borgemenke was directed to submit a plan that complied with the Ohio Constitution, the United States Constitution, and the Voting Rights Act, 42 U.S.C. §1973, *et seq.* As the testimony and evidence adduced before the District Court herein amply demonstrated, the Ohio Constitution was the predominant

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[1] The Ohio Constitution does not actually create an "Apportionment Board," but rather provides that the Governor, Secretary of State, Auditor of State, and two persons chosen by the legislative leaders of both political parties "shall be the persons responsible for the apportionment of this state for members of the general assembly." Ohio Const., Art. XI, §1. For ease of reference, the apportioning persons will hereinafter be referred to as the "Apportionment Board" or the "Board."

basis for the plan Borgemenke drew and which was ultimately adopted by the Apportionment Board.[2]

B. The Participation of Floyd Johnson

Floyd Johnson ("Johnson"), who first became involved with Ohio's reapportionment as a voting rights activist in 1965, was appointed as "redistricting and reapportionment coordinator" for the Ohio Conference of Branches of the NAACP in 1990. He was reappointed to that same position with regard to the 2001 reapportionment.

Following his appointment, Johnson sought funding for his work from the Legislative Task Force on Redistricting, Reapportionment and Demographic Research ("Task Force"). R.C. 103.51.[3] Johnson's work (office space, computer equipment, software, etc.) had been similarly funded by the Task Force during the 1991 reapportionment process without objection. Although Johnson attempted to obtain funding di-

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[2] The various Ohio Constitutional provisions that govern the apportionment process are set forth in the Appendix to Appellants' Jurisdictional Statement beginning at page 29a. *Appellants did not allege, and do not now contend, that the plan adopted by the Apportionment Board violates the Ohio Constitution in any way.*

[3] Contrary to Appellants' assertion, the Task Force is not the creation of "the House Republican Caucus." Jurisdictional Statement at 3. Rather, it is a bipartisan state agency created in 1991 by an act of the General Assembly and authorized to engage consultants in demographic research and to assist the Apportionment Board in preparing a plan of apportionment. R.C. 103.51. The Democratic and Republican members of the Task Force were *each* appropriated $150,000 to engage such consultants in the preparation of their competing proposed apportionment plans. The Democratic members engaged Robert Dykes ("Dykes"), who drafted their plan, and paid legal counsel, while the Republican members engaged Johnson and Borgemenke. Despite Appellants' professed "surprise" that the Republicans or their consultants did not "disclose" their engagement, it is clear that the Democrats made no such disclosures. Moreover, such information is (and was) easily discoverable as a public record. Indeed, Plaintiff-Appellant and then State Representative (now Senator) Ray Miller ("Miller"), was a Democratic member of the Task Force.

rectly from the NAACP, he sought funding from the Task Force as a "shortcut," given the impending deadline for the submission of plans and the "slow" funding from the NAACP.

Moreover, although Johnson's contract was with the Republican members of the Task Force, *i.e.*, he was being paid out of the appropriation set aside for the Republican members of the Task Force, his services were available to both Republicans and Democrats. Johnson attempted to consult with Democratic incumbents, including then Representative Miller, a Democratic member of the Task Force, who refused such cooperation.

C. The Adoption of the Plan

Pursuant to the Board's rules, Borgemenke submitted the Majority Members' plan to the Board on September 24, 2001. Three other plans were also timely submitted for the Board's consideration prior to the September 24 deadline: (1) a plan submitted by the Ohio Republican Party, (2) a plan drafted by Democratic consultant Dykes and submitted by Herington and Plaintiff-Appellant Ohio House Minority Leader Dean E. DePiero ("DePiero"), and (3) a plan submitted by Johnson on behalf of the NAACP, Ohio Conference of Branches.[4] The

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[4] Johnson testified at the public hearings conducted by the Apportionment Board at ten locations throughout the state. At the September 26, 2001, Board meeting, Johnson stated that the Majority Members' plan met the goals and objectives of the NAACP. Contrary to Appellants' assertion, see Jurisdictional Statement at 6-7, *the plan Johnson submitted on behalf of the NAACP was subsequently approved by the Ohio Conference of Branches.* On October 13, 2001, Johnson presented his plan, which, because of his consultation with Borgemenke, was similar to the plan adopted by the Apportionment Board, to the Ohio Conference of Branches of the NAACP annual convention. He supplied every delegate with a copy of his plan, and presented the substance to them. Following the presentation, the convention voted 98-0 to endorse Johnson's plan. The fact of Johnson's contract with the Republican members of the Task Force had been the subject of a Democratic press release on September 27, 2001, and had been in "all the papers" prior to the Ohio Conference's approval of the plan submitted by Johnson on its behalf.

Board reconvened on September 26 and October 1, 2001, to consider the various plans and to receive any testimony or evidence concerning the proposed plans.

At its October 1, 2001, meeting, the Board adopted a series of technical corrections to the Majority Members' plan, and a series of changes requested by Herington, DePiero, and other Democratic members of the General Assembly. The Apportionment Board then proceeded to adopt the Majority Members' plan, as amended. The Board reconvened on October 4, 2001, to adopt another series of technical corrections. The plan, as amended, was then published as required by Article XI, §1 of the Ohio Constitution and R.C. 107.09.

In contrast to the plan adopted by the Apportionment Board, the alternative plan advanced by the Appellants—the so-called "Herington/DePiero Plan"—was not based predominantly on the provisions of Article XI of the Ohio Constitution. Indeed, as Dykes, the plan's drafter, made clear in both his testimony to the Apportionment Board and his testimony to the District Court, on numerous occasions he elevated racial considerations over and above the requirements of the Ohio Constitution, and in particular, the Constitution's prohibition against splitting more than one political subdivision between districts.

D. Course of Proceedings Below

Appellants originally commenced this case as a class action in the United States District Court for the Northern District of Ohio on October 26, 2001, but dismissed the case and refiled in the Southern District of Ohio, also as a class action. In their complaint, Appellants set forth claims under §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. Appellants eventually decided not to pursue class certification, and instead filed an Amended Complaint adding a number of individual plaintiffs so that at least one plaintiff resided in each of the twenty-one (21) districts then

being challenged. The Plaintiffs-Appellants were all registered Democrats, and most are current or former members of the Ohio General Assembly, or candidates therefor. With the exception of Herington and DePiero, all Plaintiffs-Appellants are African-American.

Just prior to trial, the Appellants filed a Second Amended Complaint reducing the number of districts they were challenging to twelve (12) house districts ("HD") and two (2) senate districts ("SD") located primarily in four counties: Franklin (Columbus), Hamilton (Cincinnati), Mahoning (Youngstown), and Montgomery (Dayton). As noted by Judge Graham in his concurring opinion below, however, not all of the individual Plaintiffs actually challenged the districts in which they reside.[5]

The case was tried to the Court on September 30 through October 2, 2002.[6] On May 23, 2003, the District Court issued its unanimous decision rejecting all of Appellants' claims, although each member of the three-judge court submitted a separate opinion setting forth differing reasons for the

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[5] At least four of the Appellants testified either in deposition or at trial (or both) that they had no particular problem with the configuration of the districts in which they resided: Plaintiff-Appellant Stearns in HD19, Plaintiff-Appellant Parker in HD21, Plaintiff-Appellant Beatty in HD27, and Plaintiff-Appellant Mallory in HD32. The District Court majority declined to address the standing issue, see *Parker v. Ohio*, 263 F.Supp.2d 1100, 1103-04, App. at 5a (S.D.Ohio 2003), but Appellees maintain that Judge Graham was correct in his conclusion that these four Plaintiffs lacked standing, and that the District Court should have dismissed the challenges to their districts.

[6] Contrary to Appellants' assertion, the Court did not require "that direct and cross-examination testimony of all non-party lay witnesses be presented in advance of trial through transcripts of depositions." Jurisdictional Statement at 10. Rather, the Court allotted an equal amount of time over the two days of trial to each side to present its case, and, faced with these time limitations, Appellants were permitted to present some of their witnesses through the introduction of deposition transcripts, which were admitted as Joint Exhibits.

decision. *Parker v. Ohio*, 263 F.Supp.2d 1100, App. at 1a (S.D. Ohio 2003).

E. The Challenged Districts as Contained in the 2001 Plan of Apportionment

Notwithstanding Appellants' §2 challenge, the evidence submitted below demonstrates that the percentages of African-American voting age population in the challenged districts contained in the adopted plan and the corresponding districts in the Herington/DePiero Plan were substantially similar. As the information in the table below—extrapolated from the parties' Joint Exhibit 24—demonstrates, the differences in African-American voting age population, in most instances, are insignificant.

2001 Adopted Apportionment Plan			**2001 Democrat (Herington/DePiero) Plan**		
Dist. #	% Afr.-Am. Pop.	% Afr.-Am. Voting Age Pop.	Dist. #	% Afr.-Am. Pop.	% Afr.-Am. Voting Age Pop.
Franklin County					
HD26	51.40	46.94	HD21	45.60	41.60
HD27	47.14	40.95	HD20	43.39	39.85
HD21	14.81	13.72	HD22	42.37	37.89
HD20	13.63	12.56	HD26	9.30	8.66
HD25	10.14	8.93	HD27	9.29	8.28
HD19	9.53	8.13	HD28	7.62	6.81
SD15	36.28	32.24	SD15	43.82	39.81
Hamilton County					
HD33	49.79	47.25	HD30	59.41	54.80
HD32	49.01	42.41	HD31	55.32	48.95
HD31	27.32	22.51	HD32	44.23	39.99
HD28	22.50	20.50	HD36	7.24	5.97
HD29	16.40	14.65	HD33	5.47	5.03

Mahoning County					
HD60	33.58	29.85	HD62	34.50	30.80
Montgomery County					
SD5	29.64	27.38	SD5	29.81	27.09

Moreover, even a cursory county-by-county examination of the districts challenged by Appellants demonstrates that such challenges are baseless.

Franklin County House Districts. With regard to Franklin County, Appellants assert that the Board should have created three "influence districts" of above 40% African-American population. Jurisdictional Statement at 8-9.[7] As the testimony below establishes, however, to do so would have required the Board to commit numerous violations of the Ohio Constitution's prohibition against splitting more than one political subdivision between districts. Moreover, to have unnecessarily elevated racial considerations over the race-neutral provisions of the Ohio Constitution would have ignored the considerable success of African-American candidates and other candidates preferred by African-American voters in Franklin County. Indeed, Appellants' expert witness, Dr. Lisa Handley ("Handley"), whose report and testimony is discussed in greater detail below, concluded that African-Americans' preferred candidate won six of the seven Franklin County election contests she analyzed.

Franklin County Senate District. With respect to SD15, Appellants assert that the Board diluted African-American voting strength by combining three of the house districts to which they object.[8] Appellants maintain that, had the Board

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[7] This Court has generally defined "influence districts" as districts "in which [African-American voters] would have constituted an influential *minority*." *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) (emphasis in original). Districts in which minority voters constitute a majority are generally referred to as "majority-minority districts." *Id.*

[8] Pursuant to Article XI, §11 of the Ohio Constitution, senate districts are composed of three contiguous house districts.

created three house "influence districts" in Franklin County, those districts could have been combined to create a stronger senate "influence district." Jurisdictional Statement at 9. In making this argument, Appellants implicitly concede that SD15 could not have been configured as a majority-minority district. Indeed, their proposed alternative district does not contain a majority of African-American population.

Moreover, the percentage of African-American population and African-American voting age population contained in new SD15 is virtually identical to the percentage of African-American population and voting age population contained in old SD15. Indeed, new SD15 contains *only .04% less* African-American voting age population than the prior district. Senator Ben Espy, who was the African-American voters' candidate of choice, had been repeatedly elected from old SD15. Appellant Miller handily won both the 2002 Democratic primary and the November 2002 general elections for new SD15, and is now a member of the Ohio Senate from that district.[9]

Hamilton County House Districts. Appellants asserted in their Second Amended Complaint that the Board should have created "two majority-minority districts and . . . a third district in which African-Americans could influence the outcome of the election" in Hamilton County. As shown in the chart above, the 2001 plan of apportionment as adopted contains two house districts with approximately 49% African-American population. Now, however, Appellants maintain that African-American voters "are packed into those two districts, which are nearly 50% African-American." Jurisdictional Statement at 9. Appellees are unable to divine any

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[9] Although the November 2002 general election occurred following the trial in this action, it occurred well before the District Court issued its decision herein. This Court can take judicial notice of election results. See *Solomon v. Liberty County*, 957 F.Supp. 1522, 1556 (N.D.Fla. 1997), *aff'd*, 221 F.3d 1218 (11th Cir. 2000) (*en banc*).

legal theory which supports the proposition that too many minority voters were "packed" into certain "influence districts," while at the same time demanding that even more minority voters be drawn into those same districts to make them majority-minority districts.

Appellants also assert that the Board should have created a third "influence district" in Hamilton County. *Id.* The record below established, however, that this third district could not have been created consistent with the Ohio Constitution. Moreover, Handley found that African-American voters' candidates of choice won seven of the ten election contests she analyzed in Hamilton County. When taken as a whole, Appellants' arguments with respect to Hamilton County are simply nonsensical.

Mahoning County House District. Appellants have consistently acknowledged that African-Americans cannot possibly constitute a majority in any conceivable house district in Mahoning County. Nevertheless, Appellants maintain that the Board violated §2 of the Voting Rights Act by creating HD60 with "an African American population of only 33.6%." Jurisdictional Statement at 8. Appellants further suggest that any lessening of the African-American population in the district approved in *Armour v. Ohio,* 775 F.Supp. 1044 (N.D.Ohio 1991), to remedy §2 and state and federal constitutional violations found in the *1981 Democrat apportionment plan,* somehow violates "the continuing remedial goals of *Armour* . . . ." Jurisdictional Statement at 8.

Initially, it must be observed that the difference in both African-American population and African-American voting age population between HD60 in the adopted plan of apportionment and HD62 in the alternative Herington/ DePiero plan proffered by Appellants *is less than one percent.* Moreover, both the percentage of African-American population and the percentage of African-American voting age population in Appellants' proposed HD62 is less those

percentages for the house district approved in *Armour*. Under the plan as adopted, 93% of the African-American population in Mahoning County is contained in HD60, and Borgemenke testified that he simply refused to "reach a finger out and find where every African-American lives in Mahoning County and draw a snake to get to them."

Finally, as the testimony of Representative (and Plaintiff-Appellant herein) Sylvester Patton ("Patton") demonstrated, Appellants' only real complaint with respect to HD60 was the inclusion of Youngstown's Ward 4 in the district. Patton, however, handily won both the 2002 Democratic primary and general elections in new HD60 and continues to serve in the Ohio House from the district. The inclusion of Ward 4 in HD60 was required to avoid splitting the City of Youngstown in violation of Article XI, §7(C) of the Ohio Constitution,[10] and importantly, Ward 4 is also included in Appellants' proposed HD62 under the Herington-DePiero Plan.

Montgomery County Senate District. Appellants assert that SD5 is an example of "classic gerrymandering," because the district is formed by combining two Montgomery County house districts with a third house district adjacent to Montgomery County. Jurisdictional Statement at 10. Appellants fail, however, to advise the Court of several important considerations that governed the drawing of SD5.

Montgomery County contains five whole house districts. Accordingly, one senate district must be comprised of three house districts located entirely within the county, Ohio Const., Art. XI, §11, and the remaining two house districts must be combined with an adjacent house district located outside of the county. *Id.* Under the 2001 plan as adopted, as under the 1991 plan, the two house districts containing the

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[10] Significantly, it was the Dykes-drawn 1981 plan of apportionment's violation of this provision–Ohio Const., Article XI, §7(C)–in Mahoning County that the *Armour* Court concluded constituted a violation of the U.S. Constitution's Fifteenth Amendment. *Armour*, 775 F.Supp. at 1061.

bulk of the City of Dayton were combined with the house district to the north of the county.

Significantly, Appellants have consistently conceded that SD5 cannot be reconfigured as a majority-minority district. In fact, Appellants' proposed alternative SD5 contains a *smaller* percentage of African-American voting age population than does the district contained in the plan as adopted. Moreover, although the 1991 district contained only 27.21% African-American voting age population, the candidate of choice of African-American voters, former Senator (and Plaintiff-Appellant herein) Rhine McLin ("McLin"), won the seat in 1994 with more than 51% of the vote and in 1998 with more than 61% of the vote.[11] Upon McLin's election to the office of Mayor of the City of Dayton in 2001, former Representative Tom Roberts ("Roberts") was appointed to fill the remainder of her Senate term (in old SD5), and Roberts, who, like McLin, is African-American, was elected in 2002 to a full term in the Ohio Senate *from new SD5*. Indeed, Appellants' expert Handley found that African-American voters' candidates of choice won seven of the eight Montgomery County races that she analyzed.

F. Appellants' Evidence of Racial Bloc Voting

In their Jurisdictional Statement, Appellants scarcely mention the third "*Gingles* precondition"—that the white majority votes sufficiently as a bloc to usually enable it to defeat the minority's preferred candidate.[12] Indeed, Appellants' only mention of the issue is their cursory statement that "[t]he evidence presented by Appellants in the instant case establishes that in each of the four counties, African-

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[11] In winning the seat, McLin received significant support from white voters, including white voters from the "predominantly Republican" parts of the district outside of Montgomery County.

[12] As discussed below, this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), set forth three "preconditions" plaintiffs must establish when presenting a challenge under §2 of the Voting Rights Act.

Americans are politically cohesive and voting is racially polarized." Jurisdictional Statement at 22. As detailed in Judge Gwin's concurring opinion below, *Parker,* 263 F.Supp.2d at 1113-15, App. at 24a-27a, however, nothing could be further from the truth.

Appellants presumably base their unfounded assertion on the report of their expert, Dr. Handley. Handley defined "polarized voting" as election contests in which "black and white voters preferred different candidates . . . ," and concluded that most of the races she analyzed were "racially polarized" under this definition. Handley never opined, however, that the degree of "racial polarization" she found was "legally significant." Indeed, *Handley testified that she was offering no opinion on whether legally significant racial bloc voting existed in the challenged districts.* In fact, *Handley did not even review the 2001 plan of apportionment,* and offered no opinion on whether the plan violated §2 of the Voting Rights Act. Significantly, Appellants acknowledge to this Court that, "[i]n terms of the districts analyzed, the choice of African-American voters usually prevailed." Jurisdictional Statement at 22. Given this evidence from Appellants' own expert, their §2 claims were properly doomed to fail, and this Court should, therefore, summarily affirm the decision of the court below.[13]

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

I. INTRODUCTION

In an attempt to convince this Court that an important, unresolved issue of law requires the Court's attention, Appellants devote most of their Jurisdictional Statement to presenting their arguments on two issues, neither of which, even if

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[13] Both Handley's testimony, and the report and testimony of Appellees' expert, Dr. Gary King ("King") are discussed in greater detail below, *infra* at 20-24.

resolved in Appellants' favor, would result in Appellants prevailing on their claims: (1) whether circuit court decisions are controlling authority for three-judge districts courts within their jurisdiction, and (2) whether so-called "influence claims" are cognizable under §2 of the Voting Rights Act of 1965. In their zeal to convince this Court that these issues warrant plenary review, Appellants simply gloss over the numerous other fatal deficiencies in not only their §2 claims, but in all of their claims, and ignore the complete lack of evidence supporting those claims. Accordingly, the Court need not resolve either of these suggested issues.

Appellants failed to introduce any evidence establishing the third *Gingles* precondition—that white voters vote sufficiently as a bloc to enable them to usually defeat the minority group's candidate of choice. Accordingly, it is entirely irrelevant whether the District Court herein treated the Sixth Circuit's decision in *Cousin v. Sundquist,* 145 F.3d 818 (6th Cir. 1998), *cert. denied,* 525 U.S. 1138 (1999), as controlling authority. Like the Sixth Circuit, most courts that have considered the viability of "influence claims" have rejected such claims. Appellants, having "failed to demonstrate *Gingles'* third precondition," *Voinovich,* 507 U.S. at 158, the issue of whether the court below treated *Sundquist* as "controlling authority," or as merely another decision in an overwhelming line of "persuasive authority" rejecting "influence claims," is simply of no consequence. Appellants simply cannot prevail on any of their claims. This Court should, therefore, summarily affirm the decision of the District Court.

II. SECTION 2 PLAINTIFFS ARE REQUIRED TO SHOW THAT AFRICAN-AMERICANS COULD CONSTITUTE A MAJORITY IN AN ALTERNATIVE DISTRICT.

"Congress enacted §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall 'be denied or

abridged . . . on account of race, color, or previous condition of servitude.'" *Voinovich*, 507 U.S. at 152 (citation omitted). Contrary to Appellants' assertions, the proof required to establish a claim under §2 is now well-established:

> In *Thornburg v. Gingles*, [478 U.S. 30 (1986)], this Court held that Plaintiffs claiming vote dilution through the use of multimember districts must prove three threshold conditions. First, they must show that the minority group "'is sufficiently large and geographically compact to constitute a majority in a single-member district.'" Second, they must prove that the minority group "'is politically cohesive.'" Third, the plaintiffs must establish 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'"

Voinovich, 507 U.S. at 157 (citations omitted). In *Growe v. Emison*, 507 U.S. 25, 39-40 (1993), the Court "held that the *Gingles* preconditions apply in challenges to single-member as well as multimember districts." *Voinovich*, 507 U.S. at 158 (citation omitted). Plaintiffs bear the burden of establishing the three *Gingles* preconditions. *Voinovich*, 507 U.S. at 156. With respect to the first *Gingles* precondition, §2 plaintiffs bear the burden of establishing that a majority-minority district can be drawn as a remedy. See *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480 (1997) ("[A] §2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice.") (citation omitted).

Appellants correctly note that this Court has reserved the question of whether proof of the first *Gingles* precondition is necessary in all §2 cases, or "whether influence-dilution claims . . . are viable under §2." *Voinovich*, 507 S.Ct. at 154. The vast majority of circuit and district courts that have considered the issue, however, have ruled that such claims are not viable. See *Metts v. Almond*, 217 F.Supp.2d 252, 257 (D.R.I. 2002) ("[E]very circuit and most district courts that

have addressed the issue have held that claims based on an alleged ability to influence the election of candidates are not cognizable under Section 2."). See also *O'Lear v. Miller*, 222 F.Supp.2d 850 (E.D.Mich), *aff'd*, 537 U.S. 997 (2002). Should this Court find it necessary to reach this question, it should resolve it consistent with the vast majority of courts that have considered the issue.

Appellants' "influence claims" are of two distinct types, depending upon the particular district being challenged. In Mahoning County, for example, Appellants assert that the Apportionment Board impermissibly divided a group of African-American voters—by failing to reach out and include small, isolated enclaves of African-American voters in violation of the provisions of the Ohio Constitution—even though the addition of those African-American voters would not have resulted in the creation of a majority-minority district. Appellants allege, in other words, that the Board unlawfully divided a cohesive group of minority voters even though those voters could not have constituted a majority in any alternative single-member district.

In other districts, like the house districts being challenged in Franklin County, Appellants assert that African-American majorities–or near majorities—*should be divided* between more districts to create more "influence districts" and fewer (or no) majority-minority districts. As Appellants readily acknowledge, this latter theory rests on the assumption of significant white cross-over voting in support of the minority's preferred candidate. Jurisdictional Statement at 22.

In this respect, Appellants' §2 claims are, at least in part, similar to the claim rejected by this Court in *Voinovich*:

> [Plaintiffs] in this case, however, do not allege that Ohio's creation of majority-black districts prevented black voters from constituting a *majority* in additional districts. Instead, they claim that Ohio's plan deprived them of "influence districts" in which they would have

> constituted an influential *minority*. Black voters in such influence districts, of course, could not dictate electoral outcomes independently. But they could elect their candidate of choice nonetheless if they are numerous enough and their candidate attracts sufficient cross-over votes from white voters.

Voinovich, 507 U.S. at 154 (emphasis in original). As in *Voinovich*, the fatal flaw with Appellants' theory of their §2 claims is that it presupposes the existence of a condition—significant white cross-over voting—that necessarily negates the third precondition of a §2 claim—legally significant white bloc voting. See *Voinovich*, 507 U.S. at 158.

As discussed below, Appellants' failure to establish legally significant white bloc voting defeats their §2 claims, whether those claims are "influence claims" or the more traditional §2 claims dealing with majority-minority districts. Plenary review by this Court is not, therefore, warranted.

As the only support for their novel "influence claims," Appellants cite this Court's recent decision in *Georgia v. Ashcroft*, 123 S.Ct. 2498 (2003), and the decision of the New Jersey Supreme Court *McNeil v. Legislative Apportionment Comm'n of N.J.*, 177 N.J. 364, 828 A.2d 840 (2003). In *Ashcroft*, the Court ruled that, when determining whether a new legislative redistricting plan constitutes "retrogression" in violation of §5 of the Voting Rights Act, 42 U.S.C. §1973c, "a court must examine whether a new plan adds or subtracts 'influence districts'–where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *Ashcroft*, 123 S.Ct. at 2512.[14]

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[14] Citing *Ashcroft*, the New Jersey Supreme Court held in *McNeil* that a state redistricting body could properly defend against a traditional §2 claim–one challenging the state's failure to create majority-minority districts–by showing that it "distribut[ed] the voting strength of minority groups not only into majority safe districts but also into coalition or

Appellants' reliance on *Ashcroft* and *McNeil* is misplaced. Nothing in this Court's decision in *Ashcroft* suggests that states have an *affirmative §2 obligation* to distribute minority voters across a greater number of districts, as Appellants here urge. Rather, the Court merely held that states could avoid §5 liability by demonstrating non-retrogression, and that such non-retrogression could include the creation of "influence districts."

> In order to maximize the electoral success of a minority group, a State may choose to create a certain number of "safe" districts in which it is highly likely that minority voters will be able to elect candidates of their choice. Alternatively, a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.
>
> *Section 5 does not dictate that a State must pick one of these methods of redistricting over another.* Either option "will present the minority group with its own array of electoral risks and benefits," and presents "hard choices about what would truly 'maximize' minority electoral success."

Ashcroft, 123 S.Ct. at 2511-12 (emphasis added) (citations omitted). See *Hall v. Virginia*,—F.Supp.2d—, 2003 WL 21957378 (E.D.Va. Aug. 7, 2003) (rejecting the argument that *Ashcroft* authorizes §2 claims for "influence" or "coalition districts").

Indeed, *requiring* states to create influence districts demanded by various groups of minority voters, or face §2

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influence districts . . . ." *McNeil*, 177 N.J. at 384. The New Jersey court called such distribution of minority voters "a tool . . . which the states *must* be free to employ if they deem it appropriate in order to protect and promote the electoral rights and interests of minority groups." *Id.*, 177 N.J. at 384 (emphasis in original).

liability, would, in effect, absolve a §2 plaintiff of "at least the initial burden of proving an apportionment's invalidity," a burden that rests "squarely on the plaintiff's shoulders." *Voinovich*, 507 U.S. at 155. As Judge Graham noted in his concurring opinion in the court below:

> If influence claims are permitted, then any system of districtring, no matter how fair and impartial in its conception, is subject to attack unless it pools minority voters in sufficiently large enclaves so that they can "influence" the result of elections. This would transfer the principle of "one man--one vote" into "one group—one election victory."

Parker, 263 F.Supp.2d at 1108, App. at 14a (Graham, J., concurring) (footnote omitted). Such a result would contradict this Court's oft-repeated admonition that "the federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements." *Voinovich*, 507 U.S. at 156 (citation omitted).

> Section 2 contains no *per se* prohibitions against particular types of districts: It says nothing about majority-minority districts, districts dominated by certain political parties, or even districts based entirely on partisan political concerns. Instead, §2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the *effect* of denying a protected class the equal opportunity to elect its candidate of choice does it violate §2; where such an effect has not been demonstrated, §2 simply does not speak to the matter.

Voinovich, 507 U.S. at 155 (citation omitted) (emphasis in original).[15]

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[15] Moreover, *requiring* the state to create influence districts would transform the *McNeil* Court's "unpacking tool" available to the states into a "club" to be used against states regardless of the reasonableness of their redistricting plans.

As noted above, this Court need not reach the issue of whether "influence claims" are viable under §2 of the Voting Rights Act. Nevertheless, should this Court deem it necessary to resolve that issue, it should join the vast majority of courts that have considered the issue and reject such claims.

III. APPELLANTS FAILED TO ESTABLISH LEGALLY SIGNIFICANT WHITE BLOC VOTING IN ANY OF THE CHALLENGED DISTRICTS.

As noted above, this Court "need not decide how *Gingles*' first factor might apply here . . . because [Appellants] have failed to demonstrate *Gingles*' third precondition–sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice." *Voinovich*, 507 U.S. at 158. A majority of the three-judge District Court below concluded that Appellants' §2 claims failed because they had failed to establish legally significant white bloc voting. See *Parker*, 263 F.Supp.2d at 1108 (Graham, J., concurring), 263 F.Supp.2d at 1113-15 (Gwin, J., concurring).[16] On appeal, Appellants simply gloss over this glaring deficiency in their §2 claims.

The final two *Gingles* pre-conditions require an examination of whether voting in elections for seats in the Ohio General Assembly is "racially polarized."

> The purpose of inquiring into the existence of racially polarized voting is two-fold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates. Thus, the question whether a given district experiences legally significant racially polarized voting

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[16] Chief Judge Martin, in his opinion for the three-judge District Court, declined to reach the issue. See *Parker*, 263 F.Supp.2d at 1105.

> requires discrete inquiries into minority and white voting practices.

Gingles, 478 U.S. at 56 (citations omitted).

> Both the second and third *Gingles* pre-conditions . . . require a court to consider the voting behavior of different races. However, the inquiry in the second pre-condition differs from that involved in the third: the former asks merely whether voters of the same race tend to vote alike, and the latter evaluates whether "a bloc-voting majority can routinely outvote" the minority, thereby "impair[ing] the ability of a protected class to elect candidates of its choice."

Sundquist, 145 F.3d at 823 (citations omitted). "[T]he question here is not whether white residents tend to vote as a bloc, but whether such bloc voting is 'legally significant.'" *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (*en banc*), *cert. denied*, 510 U.S. 1071 (1994). "[B]loc voting [is] a matter of degree, with a variable legal significance depending on other facts . . . ." *Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994) (citation omitted). "[I]n general, a white bloc vote that normally will defeat the combined strength of minority vote support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Gingles*, 478 U.S. at 56.

In the case at bar, Appellants offered no evidence of legally significant racial bloc voting for any of the districts at issue herein, and indeed, the evidence they did introduce *proved that no such bloc voting exists in the challenged districts.* Appellants' expert, Dr. Handley, testified that she has no opinion as to whether there is legally significant racial bloc voting in any of the districts:

Q. Now, in your report, Dr. Handley, you do not issue any opinion as to whether there's legally significant racial bloc voting do you?

A. I do not.

Tr. at 207. Indeed, Handley did not review the 2001 plan of apportionment to determine whether it violated §2 of the Voting Rights Act:

Q. Now, you have not reviewed in any detail the 2001 apportionment plan, have you?

A. I have not.

Q. And you are not opining as to the 2001 apportionment plan as adopted as respects the Voting Rights Act, are you?

A. That's correct.

Tr. at 224.

Moreover, in her report, Pl.Ex. 33, Handley affirmatively opined that voting in Mahoning County was *not* racially polarized. With regard to Franklin County, Handley opined, that "[d]espite polarized voting, the black preferred candidate won most of these contests because the candidates were competing in effective black districts." With respect to Hamilton County, Handley concluded that "[t]he black-preferred candidate won all of the contests in districts with significant black populations . . . ." She reached a similar conclusion with regard to Montgomery County: "Despite polarized voting, the black-preferred candidate won all but one of these contests because the candidates were competing in effective black districts," even though "[b]lacks did not constitute a majority of the voting age population in any of the three effective districts."

Thus, with respect to voting *in every county in which the districts challenged by Appellants are located,* Handley essentially concluded that the white majority does not "vote[ ] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate," *Voinovich,* 507 U.S. at 157 (citation omitted). Indeed, in her report, Handley summarized her findings as follows:

> In fact, black voters are quite successful at electing black-preferred candidates in districts significantly less

> than majority black. This is because *there is often a substantial amount of white crossover voting for black-preferred candidates.*

Pl.Ex. 33 at 2 (emphasis added).[17] Handley found that the candidate preferred by African-American voters won twenty-five (25) of the thirty (30) elections she analyzed and for which her analysis provided "reliable estimates." Such results can hardly be considered evidence of legally significant white bloc voting. See *Johnson v. Hamrick*, 296 F.3d 1065, 1077 (11th Cir. 2002) (Plaintiffs failed to establish legally significant white bloc voting where "the candidate preferred by black voters wins as often as he or she loses, 45.5% of the time.") (citation omitted).

Indeed, although African-Americans constitute only 11.46% of the statewide population, and only 10.47% of the state's voting age population, 14 of 99 (14.1%) Ohio House seats and 4 of 33 (12.1%) Ohio Senate seats are currently held by African-Americans. See *DeGrandy*, 512 U.S. at 1000 (§2 claim may be defeated by a showing that minority group can elect its candidate of choice in a number of districts roughly proportional to the minority group's population in the state as a whole). "It is obvious that unless minority group members experience difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect.'" *Gingles*, 478 U.S. at 48 n.15. See also *Cano v. Davis*, 211 F.Supp.2d 1208, 1231 (C.D.Cal. 2002) ("Of course, if minority-preferred candidates actually win elections, then the minority is able to elect representatives of its choice."), *aff'd*, 537 U.S. 1100 (2003).

> Plaintiffs' evidence does show that Latinos prefer Latino candidates in far higher proportions than do non-Latinos;

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[17] Handley's report and testimony is consistent with *Appellants' allegation* that "[t]here is significant non-African-American cross-over vote in many parts of Ohio that elects African-Americans to state legislative office." Second Amended Complaint at 8, 33.

> but it also shows that substantial numbers of non-Latinos support Latino candidates, with the result that the Latino candidates actually win elections. Thus, the evidence of racial polarization is insufficient *as a matter of law* to establish the "effects" required in a vote dilution case.

Cano, 211 F.Supp.2d at 1238 (emphasis added).

Appellants' own expert concluded, in effect, that legally significant white bloc voting did not exist in any of the challenged districts. Even if Handley's report were somehow considered sufficient to facially satisfy the third *Gingles* pre-condition, it was overwhelmingly rebutted by the report and testimony of Appellees' expert, Dr. Gary King ("King").[18]

In contrast to the limited racial bloc voting analysis performed by Handley, King performed an exhaustive analysis considering virtually every state legislative election in the urban counties during the last decade. King noted that Handley only reviewed a small selection of elections and types of races. She ignored races involving only white candidates, regardless of the African-American population in the district.

After reviewing all relevant races, King concluded as follows:

> Quite remarkably, the degree of racially polarized voting when a white Democrat runs against a white Republican (31.7%) is almost the same as the degree of racially polarized voting when a Black Democrat runs against a white Republican (31.8%). This strongly suggests that

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[18] King is the David Florence Professor of Government at Harvard University and the Director of the Harvard-MIT Data Center. King is the "world's foremost authority on the statistical analysis of racial bloc voting. Dr. King's techniques have been widely recognized in the academic community and utilized in other voting rights cases." *Mallory v. Ohio*, 173 F.3d 377, 383 (6th Cir.), *cert denied*, 528 U.S. 951 (1999). Dr. King extensively criticized Handley's report and methodology.

> the race of the candidate has not been a major factor in the elections analyzed.

Def. Ex. C at 17-18.[19] Indeed, King found that, overall, a greater percentage of white voters voted for a black Democratic candidate (52.6%) than voted for a white Democratic candidate (47.7%). In sum, King stated that "[t]he bulk of the substantial evidence provided leads me to conclude that racially polarized voting has not reached levels of legal significance in these elections."

Because both Appellants' and Appellees' evidence established that legally significant racial bloc voting does not exist in the legislative elections in Ohio, Appellants' §2 claims fail as a matter of law. Accordingly, this Court should summarily affirm the decision of the District Court herein.[20]

IV. APPELLANTS FAILED TO INTRODUCE SUFFICIENT EVIDENCE TO SUPPORT THEIR CONSTITUTIONAL CLAIMS.

A. Appellants' Fourteenth Amendment Claim

To establish a Fourteenth Amendment claim under this Court's decision in *Shaw v. Reno,* 509 U.S. 630 (1993),

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[19] In King's report and testimony, "[t]he 'degree of racial bloc voting' is the difference between the percentage of blacks who voted for the Democratic candidate and the percentage of whites who voted for the Democratic candidate . . . ." *Mallory v. Ohio,* 38 F.Supp.2d 525, 538 (S.D.Ohio 1997) (referring to King's ecological regression analysis), *aff'd,* 173 F.3d 377 (6th Cir.), *cert. denied,* 528 U.S. 951 (1999).

[20] Appellees also note that Appellants failed to prove their §2 claims under the "totality of the circumstances." See *Gingles,* 478 U.S. at 79. The only evidence Appellants offered on the "totality of the circumstances" factors, see *Gingles,* 478 U.S. at 36-37, was the report of Professor Paul J. Cook, Sr., of Central State University, which report deals exclusively with the history of racial discrimination *from 1787 to 1920.* This evidence does not establish that African-Americans are currently denied the right to register, vote, or otherwise participate in the electoral process. In fact, Cook expressly acknowledged that he was not rendering any opinions regarding current conditions or behavior.

plaintiffs must establish that "race was the predominant factor motivating the" state's redistricting decisions, or that the state "subordinated traditional race-neutral districting principles . . . to racial considerations." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Indeed, in 1997, a three-judge court of the United States District Court for the Northern District of Ohio ruled that compliance with the traditional districting principles contained in Article XI of the Ohio Constitution shields a reapportionment plan from strict scrutiny under Fourteenth Amendment analysis and ultimately defeats a claim of racial gerrymandering. *Quilter v. Voinovich*, 981 F.Supp. 1032, 1044-50 (N.D.Ohio 1997), *aff'd*, 523 U.S. 1043 (1998). This Court recently emphasized the heavy burden on plaintiffs to establish a *Shaw* claim. *Easley v. Cromartie*, 532 U.S. 234, 241-42 (2001).

It must be initially observed that Appellants made no claim in this case that the 2001 apportionment plan was based upon anything other than geography. See Second Amended Complaint at 8, 32 ("Upon information and belief, the *Defendants focused solely on geography* in drawing race based legislative districts.") (emphasis added). Significantly, Appellants did not, and do not, assert that the plan violates the Ohio Constitution in any way.

Moreover, Borgemenke, who drafted the 2001 plan of apportionment, testified *without contradiction* that the predominant basis for crafting district lines was Article XI of the Ohio Constitution. The provisions of Article XI of the Ohio Constitution require districts to be based upon geographical and political boundaries and are, therefore, race-neutral. See App. at 29a-35a. Article XI contains detailed restrictions on crafting state legislative districts, thereby limiting the ability of drafters to engage in racial gerrymandering. See *Quilter*, 981 F.Supp. at 1044-45 ("The State of Ohio has established districting criteria to be followed, including the customary principles discussed above, in Article XI of the Ohio Consti-

tution. Many states have codified traditional districting criteria, either in statutes or in constitutions. Ohio, however, appears to have prescribed more extensive and specific criteria than any other state.") (footnote and citations omitted).

Borgemenke had been instructed by members of the Apportionment Board to draw a plan that complied with the Ohio Constitution, and he did so. Indeed, on several occasions, Borgemenke advised Johnson, the NAACP's redistricting coordinator and a consultant engaged by the Republican members of the Task Force, that he could not "reach out" to pick up additional African-American population because doing so would violate the Ohio Constitution. Instead, Borgemenke opted for following the Ohio Constitution "every time," and made no "changes to draw on race."

Compliance with the provisions of Article XI of the Ohio Constitution contravenes the notion "that the state substantially disregarded or neglected traditional districting principles—that race was the *predominant* factor, the criterion that could not be compromised," a showing necessary to invoke strict scrutiny under the Fourteenth Amendment. *Quilter*, 981 F.Supp. at 1048 (emphasis in original) (citation omitted). Because Appellants have failed to introduce any evidence that race was the predominant factor motivating the drawing of district lines under the 2001 plan of apportionment, the District Court below properly rejected their Fourteenth Amendment claim, and this Court should summarily affirm.

B. Appellants' Fifteenth Amendment Claim

Proof of discriminatory intent is required to establish a claim under the Fifteenth Amendment to the United States Constitution. See *Rodgers v. Lodge*, 458 U.S. 613, 617 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980). To establish liability under the Fifteenth Amendment, "plaintiffs had to prove first that vote dilution, as a special form of discriminatory effect, exists and second, that it results from a

racially discriminatory purpose chargeable to the state." *Lucas v. Townsend,* 967 F.2d 549, 551 (11th Cir. 1992) (citing *Washington v. Finlay,* 664 F.2d 913, 919 (4th Cir. 1981), *cert. denied,* 457 U.S. 1120 (1982)). "This Court has not decided whether the Fifteenth Amendment applies to vote dilution claims; in fact, we never have held any legislative apportionment inconsistent with the Fifteenth Amendment." *Voinovich,* 507 U.S. at 159 (citation omitted).

C. Appellants' Evidence of Intentional Discrimination

Appellants cite to only two pieces of evidence to support both their Fourteenth and Fifteenth Amendment claims. As the unanimous District Court below held, however, Appellants' evidence was insufficient to support either claim.

Initially, it must be observed that, for the first time in this litigation, Appellants, in their Jurisdictional Statement, assert that the Republican members of the Task Force's engagement of Johnson as a consultant, in and of itself, constituted a violation of the Fourteenth and/or Fifteenth Amendments. In the court below, Appellants maintained that Johnson's actions constituted a breach of trust between him and the NAACP, and that his engagement constituted evidence of intentional discrimination. Appellants did not, however, claim, as they do now, that the very fact of Johnson's engagement constituted intentional racial discrimination in violation of the Fourteenth or Fifteenth Amendments.

Moreover, Appellant's argument in this regard completely eviscerates a required element of unconstitutional discrimination—that there be both discriminatory intent and effect. Appellants made no showing of discriminatory effect, *i.e.,* how Johnson's engagement resulted in districts that dilute African-American voting strength. As discussed in great detail above, Appellants have completely failed to establish that any of the challenged house or senate districts dilute African-American voting strength. Indeed, as noted by Judge

Gwin, African-American General Assembly candidates won 74 of the 84 races involving an African-American candidate from 1992 through 2000, and currently hold seats in both houses of the General Assembly at, or in greater proportion than, the proportion of African-American voting age population in the state as a whole. *Parker,* 263 F.Supp.2d at 1113-14, App. at 24a (Gwin, J., concurring).

Finally, Johnson's engagement by the Republican members of the Task Force simply does not constitute evidence of discriminatory intent. Johnson viewed his engagement by the Task Force as a means of funding his work for the NAACP, and, in fact, his work (office space, computer equipment, software, etc.) had been similarly funded during the last decade's reapportionment, without objection. Although Johnson was compensated out of the appropriation allocated to the Republican members of the Task Force, Johnson attempted to work with members of both political parties.

Appellants' assertion that Johnson and the Republican members of the Task Force attempted to conceal Johnson's consulting contract is ludicrous. Johnson served in the same capacity during the 1991 apportionment process, and his work was similarly funded by the Task Force. His contract was discoverable (and, in fact, was discovered) as a public record. When questioned by Apportionment Board member (and Plaintiff-Appellant herein) Herington at the public hearing on the plan he submitted on behalf of the NAACP, Johnson fully explained the circumstances of his engagement.

Moreover, it must be observed that the NAACP, as an organization, in contrast to the individual Appellants herein, has never objected to Johnson's consulting contract, despite the fact that its existence was known prior to the adoption of the 2001 plan of apportionment, it having been widely reported since at least September 27, 2001, the date it was the subject of a press release issued by the Ohio House and Senate Democratic Caucuses. Indeed, the NAACP endorsed

Johnson's work after his consulting agreement had been reported "in all of the newspapers." The NAACP has not commenced an action against Johnson or sought to intervene herein, and has not done so because it presumably recognizes Johnson's consulting agreement for what it was: a means to fund his work on behalf of the NAACP.

The only other piece of evidence relied upon by Appellants to establish intentional discrimination is the transcript of a telephone call between Brett Buerck ("Buerck"), Chief of Staff of the Ohio House of Representatives, and Doug Mink ("Mink"), an unsuccessful candidate in the 2002 Republican primary for a seat in the House of Representatives from new HD28, one of the challenged districts in Hamilton County. The conversation took place during the first week of March, 2002, *five months after* the 2001 plan of apportionment was adopted by the Board. Buerck had telephoned Mink to convince him to withdraw from a primary contest against the Republican caucus' endorsed candidate. During their conversation, Buerck stated that 13,000 African-Americans had been removed from HD28 and 14,000 Republicans added. As the District Court below recognized, however, an examination of the facts and circumstances surrounding Buerck's statement and the district involved reveals that the statement offers no support for Appellants' claim of intentional discrimination.

Old HD31, which is the district to the south of old HD32 (the new HD28 at issue herein), was unconstitutionally 19% "light" in population. Accordingly, Borgemenke added Ward 24 of the City of Cincinnati, which had been a part of old HD32, to old HD31 (which became HD32 under the 2001 plan). This change had the effect of making old HD32 (new HD28), which was already 8% constitutionally "light" in population, even lighter. Accordingly, Borgemenke added population to new HD28 by including therein whole municipalities, *i.e.*, the northern Cincinnati suburbs. Consequently,

new HD28 contains 14 whole municipalities and the non-contiguous portions of two townships.

Significantly, the difference in African-American voting age population between old HD32 and new HD28 is *only 0.26%*. The district is compact and contiguous, and follows political subdivision boundaries as required by Article XI of the Ohio Constitution. Buerck had absolutely no responsibility for drawing district lines under the 2001 plan of apportionment, and his statement to Mink was simply incorrect.

The record in this case belies any indication of intentional discrimination against African-American voters. The Apportionment Board conducted public meetings throughout the state. Their deliberative meetings in Columbus were also open to the public and were transcribed. In drafting the plan, Borgemenke consulted with Republicans, Democrats, county party chairmen, incumbents, challengers, and others, including Johnson. Moreover, on numerous occasions, he consulted with African-American Democratic incumbents and made several adjustments to his plan as requested by such incumbents. Simply put, there is no evidence that Borgemenke drew district lines with the purpose to discriminate against African-American voters. Accordingly, the District Court correctly rejected Appellants' Fourteenth and Fifteenth Amendment claims, and this Court should summarily affirm the decision of that court.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be summarily affirmed.

Respectfully submitted,

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